OPINION OF ADVOCATE GENERAL TIZZANO
delivered on 22 January 2004 [1]

1. The present proceedings are concerned with an action brought by the Portuguese Republic under Article 230 EC for the annulment of Decision C(2000)3543 final, of 22 November 2000, adopted by the Commission under Article 21 of Regulation No 4064/89 (Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, [2] hereinafter also referred to as 'the Merger Regulation'). By the contested decision, the Commission declared to be contrary to Community law in particular the interests protected by two measures adopted by the Portuguese Minister of Financial Affairs withholding the necessary authorisation for the acquisition of shares in a company being privatised, and required Portuguese authorities to withdraw those measures.

I — Legislative background

The Community legislation

2. In order to contribute to the creation of 'a system ensuring that competition in the internal market is not distorted' (Article 3 (g) EC), Regulation No 4064/89 set up a system for advance monitoring of concentrations having a Community dimension. [3] To that end, the Merger Regulation provided in particular that such operations are to be notified to the Commission in due time and cannot be carried out without explicit or

1 — Original language: Italian.

2 — OJ 1989 L 395, p. 1 (a corrected version was then published in OJ 1990 L 257, p. 13). Regulation No 4064/89 was later amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1).

3 — The definition of 'concentration' is given in Article 3 of the Merger Regulation, and Article 1(2) and (3) explain what is meant by a concentration having a 'Community dimension'.

implicit authorisation [4] from the Commission. Consequently, short and binding time-limits were laid down within which the Commission is required to determine whether the operations in question are 'compatible with the common market': they will be compatible if they do not 'create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it'. [5]

3. In that context, the part of Article 21 which is relevant here provides as follows:

'1. Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation.

2. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.

3. Notwithstanding paragraphs 1 and 2, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this regulation and compatible with the general principles and other provisions of Community law.

Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.

Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within one month of that communication.'

The national legislation

4. As far as the relevant national legislation is concerned, Decree-Law No 380 of 15

4 — Article 7.

5 — Article 2(2) Conversely, Article 2(3) indicates when concentrations are to be declared 'incompatible with the common market'.

November 1993 [6] ('Decree-Law No 380/93'), adopted in implementation of Framework Law No 11 on privatisation of 5 April 1990 (hereinafter 'the Framework Privatisation Law' or 'Law No 11/90') [7] is noteworthy. For the present purposes, Article 1 is important. It provides:

'1. The acquisition *inter vivos*, with or without consideration, by a single natural or legal person, of shares representing more than 10% of the voting capital, and the acquisition of shares which, when added to those already held, exceed that limit, in companies which are to be re-privatised, shall require the prior authorisation of the Minister for Financial Affairs.

2. Subject to the conditions laid down for each privatisation procedure, the provisions of paragraph 1 shall apply only to acquisitions made following privatisation.'

6 — *Diário da República* I, Series A, No 267, of 15 November 1993, p. 6362.

7 — *Diário da República* I, Series A, No 80, of 5 April 1990, p. 1664.

II — Facts and procedure

The operation relating to the acquisition of Cimpor

5. The present case derives from the planned acquisition of the Portuguese company Cimpor-Cimentos de Portugal SGPS (hereinafter 'Cimpor') by the Portuguese company Secil Companhia Geral de Cal e Cimentos SA (hereinafter 'Secil') and by the Swiss company Holderbank Financière Glaris SA (hereinafter 'Holderbank'). The acquisition was intended to take place through the Spanish company Secilpar SL (hereinafter 'Secilpar'), a wholly-owned subsidiary of Secil, and was to lead to the division of Cimpor's business between Secil and Holderbank: the first was to receive the business in Spain and Egypt, together with part of the business in Brazil; the second was to receive the business in Portugal, Morocco, Tunisia and Mozambique, together with the other part of the business in Brazil.

6. At the time of the intended purchase, Cimpor — which had for a long time been wholly owned by the State — was the subject of a privatisation process which had started in 1994, whereby the Portuguese authorities were gradually reducing their interest (it had come down to 12.7% of the capital at the material time) and had secured a quotation for the company on the Lisbon stock exchange. Notwithstanding that privatisation process, Article 22 of the statutes of the company attributed special rights to the shares maintained by the State (the so-called

'golden share'), giving the Portuguese Government a right of veto on strategic decisions and amendments to the statutes. Under Article 7 of the statutes no shareholder other than the State or other public bodies could cast a vote exceeding 10% of the total.

7. On 15 June 2000, Secilpar made a public offer to acquire the shares of Cimpor ('the takeover bid') to which the following conditions, inter alia, applied: (i) acceptance of the offer by shareholders holding at least 67% of the capital; (ii) removal of the Portuguese Government's special rights, possibly by its agreeing to the takeover bid; and (iii) removal by the general meeting of shareholders of the limitations on the exercise of voting rights provided for in Article 7 of the statutes.

The steps taken by the Portuguese authorities

8. Before it was even notified to the Commission in accordance with the Merger Regulation (as we shall see shortly), on 16 June 2000 that operation was notified to the Portuguese Minister of Financial Affairs for the purpose of obtaining the authorisation provided for in Article 1 of Decree-Law No 380/93. [8]

8 — As noted in point 4, under that provision special authorisation is required from the Minister of Financial Affairs for the acquisition of more than 10% of the voting capital of a company being privatised

9. By decision of 5 July 2000, however, the Minister refused to grant authorisation, making it clear that the Portuguese Government did not intend to give up the special rights conferred on it by the statutes of the company, and opposed removal of the limitations on the voting rights under the statutes.

10. On 7 July 2000, Secilpar and Holderbank submitted to the Minister of Financial Affairs a new request for authorisation, in which they declared that they no longer made the takeover bid subject: (i) to removal of the Portuguese State's special rights in Cimpor; or (ii) to the sale of the State holding otherwise than by the procedure laid down by the Framework Privatisation Law.

11. The Minister gave his decision in response to that request on 11 August 2000.

12. In his decision he stated in particular that the general meeting of Cimpor had rejected the proposed removal of the limitation on the exercise of voting rights, with the result that the takeover bid appeared to have become inoperative. Turning to the substantive aspects, the Minister refused the authorisation requested in any case, claiming that the aims pursued by the applicants ran counter to the objectives of the privatisation. The reasons given for that conflict were in particular that: (i) the acquisition would have removed Cimpor from the Portuguese capi-

tal market; (ii) the applicants' industrial project was incompatible with the Portuguese Government's strategies concerning restructuring of the sector; (iii) the acquisition would prevent the transfer of the State's holding in Cimpor under optimum economic and financial conditions; and (iv) the acquisition would infringe the principle of equal treatment in the last phase of the privatisation process.

13. Following the Minister's negative decision, on the same date, 11 August 2000, the Commissão do Mercado de Valores Mobiliários (Stock Market Commission) informed Secilpar of its decision to order withdrawal of the takeover bid.

Notification of the operation to the Commission and the Commission's comments regarding the Portuguese measures

14. After being notified to the Minister of Financial Affairs, the planned acquisition of Cimpor was notified to the Commission in accordance with the Merger Regulation. The notification, made on 4 July 2000, was regarded by the Commission as incomplete and it therefore invited the parties to supplement it by 28 August 2000 — a time-limit which was later extended to 15 September. Since, however, the requested information had still not reached it by that date, the Commission decided to suspend its analysis of the operation. On 11 January 2001 the notification of the concentration operation was finally withdrawn.

15. In the meantime on 16 August 2000 the head of the private office of the Portuguese Minister of Financial Affairs had disclosed 'on a private basis' to the chef de cabinet of the member of the Commission responsible for competition policy the measure of 11 August whereby, for the second time, Secilpar and Holderbank were refused authorisation to acquire an interest in Cimpor in excess of 10% of its capital.

16. Thereafter, by letter of 21 September 2000 the member of the Commission responsible for competition policy informed the Portuguese Minister that the operation had been duly notified and conveyed to him the Commission's doubts as to the compatibility of his decisions of 5 July and 11 August 2000 with Article 21 of the Merger Regulation.

17. In that letter it was stated in particular that those decisions did not appear to be designed to protect any of the interests treated as 'legitimate' by the second subparagraph of Article 21(3) of the Merger Regulation (public security, plurality of the media and prudential rules, hereinafter 'the intrin-

sically legitimate interests'). The Commission had thus come to the view that the Portuguese Government had failed in its obligations under the third subparagraph of Article 21(3), pursuant to which it was required to give notice of the various public interests protected, in order to enable the Commission to assess their compatibility with Community law, and await the latter's approval.

18. The Commission also stated that, if it reached the conclusion that the interests protected by the decisions of 5 July and 11 August 2000 were in fact not intrinsically legitimate interests, it would adopt the appropriate measures. It added that it would also adopt appropriate measures in the event that the interests actually protected (other than intrinsically legitimate interests) proved incompatible with Community law. Finally, the Commission invited the Portuguese Government to submit its observations on those matters by 5 October 2000.

19. The Portuguese Minister replied to the Commission's objections by letter of 3 October 2000. In it he stated, first of all, that in this case he had not applied national competition law but merely the privatisation provisions of Decree-Law No 380/93. The Minister added that the last phase of the privatisation of Cimpor was approaching and that, once it was completed, the special rights accorded to the Portuguese State would be removed and Decree-Law No 380/93 would no longer be applied.

The contested decision

20. Not satisfied with that reply, on 22 November 2000 the Commission adopted the contested decision, whereby it declared that '[t]he interests underlying the decision of the Portuguese Minister of Financial Affairs dated 6 July 2000 [in fact 5 July 2000], as reformulated on 11 August 2000, which were not notified to the Commission, contrary to Article 21(3) of Regulation No 4064/89, are incompatible with Community law' (Article 1). [9]

21. In reaching that conclusion, the Commission found above all that the notified operation would have given rise to two concentrations, as a result of Secil and Holderbank acquiring the business activities of Cimbor intended for each of them respectively (see point 5 above). [10] The Commission then decided that the operation

9 — The translations of the contested decisions are unofficial, only the Portuguese version being authentic.

10 — Paragraph 11.

had a Community dimension in that the acquisition by Holderbank of the Cimbor business intended for it satisfied the criteria laid down in that regard by Article 1(2) of Regulation No 4064/89. [11]

22. Having found that the operation fell within the scope of Regulation No 4064/89, the Commission went on to consider whether the Portuguese decisions of 5 July and 11 August 2000, which had blocked that operation, conformed with Article 21 of the Merger Regulation.

23. In that connection, it stated first that, according to the text of the decisions, they were intended to protect the interests in the 'development of the shareholding structures in companies undergoing privatisation with a view to reinforcing the corporate capacity and the efficiency of the national production apparatus in a way that is consistent with the economic policy guidelines in Portugal'. [12]

24. The public interest protected by the two decisions having thus been identified, the Commission then made it clear that it could not be regarded as falling within the scope of any of the intrinsically legitimate interests (public security, plurality of the media and prudential rules). [13] It followed, in the Commission's view, that the Portuguese authorities were not entitled to block the transaction without informing it what other public interest they intended to protect and awaiting its decision on the matter. On that basis, it therefore concluded that '[b]y not having submitted this communication ... the Portuguese Government [had] failed to comply with its obligations under Article 21 of Regulation No 4064/89'. [14]

25. Despite the lack of any notification and the fact that the Portuguese authorities did not, in reply to its letter of 21 September, identify the public interest they intended to protect, the Commission concluded that it was entitled to infer what that interest was from the text of the decisions (as it had already done in order to establish whether it might fall within the scope of one of the intrinsically legitimate interests) and to assess the compatibility thereof with Community law. [15]

26. After then observing that the interest underlying the two decisions was that of protecting the 'development of the shareholding structures in companies undergoing

11 — Paragraph 12.
12 — Paragraph 50.
13 — Paragraphs 52 to 54.
14 — Paragraph 50.
15 — Paragraphs 57 to 62.

privatisation with a view to reinforcing the corporate capacity and the efficiency of the national production apparatus being consistent with the national economic policy guidelines', the Commission appraised the compatibility with Community law of that interest (or, rather, of the decisions designed to protect it), and stated as follows:

'The two decisions constitute barriers to the freedom of establishment and free movement of capital enshrined in the Treaty, and are not warranted under any essential grounds of public interest recognised in the case-law of the Court of Justice; in any event, the Portuguese Government has not advanced any such grounds. Moreover, the general principle of equal treatment, which is relied on by the Portuguese Government in the first decision, adds nothing of substance to the grounds set out above.

Consequently, even apart from the failure by the Portuguese Government to communicate the reasons for its decisions to the Commission in accordance with Article 21 (3) of the Regulation, the Commission must decline to recognise them as legitimate.' [16]

27. In the final paragraphs of the decision, which set out its conclusions, the Commission then stated:

'It must be concluded that the measures adopted by the Portuguese authorities in relation to the notified operation, and in particular the decision of the Portuguese Minister of Financial Affairs dated 6 July 2000, as reformulated in 11 August 2000, cannot be considered as measures designed to protect legitimate interests compatible with the general principles and other provisions of Community law. These measures, consequently, are contrary to Community law, in particular Article 21 of Regulation 4064/89.

The Republic of Portugal is therefore obliged to take the necessary measures to comply with Community law and withdraw the abovementioned decisions.' [17]

The procedure before the Court

28. By application received at the Court Registry on 1 February 2001, the Portuguese Government challenged the Commission

16 — Paragraphs 58 and 59

17 — Paragraphs 64 and 65.

decision, seeking its annulment under Article 230 EC. The Commission of course opposed that application and lodged a defence, which was followed by a reply and a rejoinder. On conclusion of the written procedure, the parties presented oral argument at the hearing on 9 September 2003.

III — Legal analysis

Introduction

29. In its application, after submitting, as a preliminary point, that the contested decision 'lapsed' following the withdrawal of the notification by Secil and Holderbank, the Portuguese Government criticises the decision in six respects. It complains, in particular of:

(i) infringement of Article 253 EC: the lack of any, or an insufficient, indication of the legal basis for the measure;

(ii) infringement of Article 253 EC: an inadequate statement of the reasons for which the national measures were incompatible with Community law;

(iii) infringement of Article 7 EC and Article 21(1) and (3) of the Merger Regulation: the Commission lacked competence to adopt the contested decision in the absence of any notification from Portugal concerning the interests protected by its measures;

(iv) infringement of Article 220 EC and Article 21(1) of the Merger Regulation: having adopted the contested decision in the absence of the abovementioned notification, the Commission substituted itself for the Court of Justice in verifying the legitimacy of the Portuguese measures;

(v) breach of the principle of proportionality: the Commission, first, did not limit its examination to the concentration of a Community dimension (Holderbank-Cimpor) and, second, it failed to suspend the procedure despite the fact that the parties had no further interest therein;

(vi) misuse of procedure and infringement of Article 226 EC: notwithstanding the lack of the abovementioned notification from the Portuguese authorities, the Commission adopted the contested decision rather than commencing infringement proceedings.

30. It is clear that three of the pleas (the third, fourth and sixth) are essentially concerned with the Commission's competence to adopt the contested decision in the absence of a notification from Portugal as to the interests protected, whereas the other pleas relate to formal or substantive defects of the decision. For the sake of clarity and orderly presentation, after a brief discussion of the alleged 'lapse' of the contested decision, it will be appropriate to start by examining the criticisms alleging the Commission's lack of competence, and then to review those concerning the alleged formal and substantive defects of the decision.

Preliminary observation concerning the 'lapse' of the contested decision

31. The Portuguese Government states at the outset that the contested decision was adopted under the procedure triggered by the notification to the Commission of the planned Secil/Holderbank/Cimpor concentration. In view of the fact that, following the adoption of the contested decision, that notification was withdrawn (see point 14 above), the Portuguese Government considers that the decision 'lapsed' in some way. It is not however clear for what purpose that preliminary observation was made since, in the pleas in law, no reference is made to it, the Court simply being requested to annul the decision and order the Commission to pay costs.

32. I do not consider it necessary to dwell on this point. I shall merely observe that, if it was made in support of the claim that the decision should be annulled, the Portuguese Government's observation is clearly irrelevant. As the Commission has rightly pointed out, it is settled case law that 'in the context of an application for annulment under Article 173 of the Treaty [now Article 230 EC] the legality of a Community measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted.' [18] The withdrawal of the notification after the adoption of the contested decision can therefore have no impact on the legality of the decision.

33. I would add that the observation in question would not be treated differently even if the Portuguese Government thereby wished to suggest that the Court should declare that the present application is devoid of purpose in that, even before it was brought, the contested decision had 'lapsed'. It is clear that the withdrawal of the notification by Secil and Holderbank could not give rise either to annulment or to cancellation of the contested decision, and the decision therefore continues to exist and to form the subject-matter of the action brought by the Portuguese Government.

18 — Case C-449/98 P *IFCC* v *Commission* [2001] ECR I-3875, paragraph 87.

The pleas regarding the Commission's competence to adopt the contested decision in the absence of a prior notification from Portugal

Arguments of the parties

34. As indicated earlier, by its third, fourth and sixth pleas in law, which I will go on to examine together, the Portuguese Government contends essentially that, in the absence of any notification from the Portuguese authorities concerning the interests protected by the measures of 5 July and 11 August 2000, the Commission was not entitled to adopt the contested decision.

35. In that connection, the Portuguese Government concedes that those measures were not designed to protect any of the intrinsically legitimate interests and that therefore, by virtue of the third subparagraph of Article 21(3) of the Merger Regulation, it should have given the Commission notice of the various public interests protected and awaited approval from the Community institution. It contends, however, that in the absence of such a notification, the abovementioned provision of the regulation does not empower the Commission to take a decision as to whether the interests protected are compatible with Community law.

36. The Portuguese Government goes on to say that the literal meaning of the provision is to that effect and that its view is supported by the fact that, in such a situation, the Commission could not have any certainty as to the interests actually protected by the Member State concerned and might therefore make a pronouncement about interests which in reality do not underlie the national measures in question.

37. Nor in its view is the position any different, contrary to what the Commission claims, by virtue of the fact that it is necessary to ensure the useful effect of the third subparagraph of Article 21(3) of the Merger Regulation. According to the Portuguese Government, it is not necessary, in order to ensure Community monitoring of the legality of national measures, to stretch the meaning of the provision in question, because the same result could be achieved by recourse to ordinary Treaty-infringement proceedings under Article 226 EC.

38. And it was precisely to that procedure which, in the Portuguese Government's opinion, the Commission should have had recourse, bringing the case before the Court of Justice, rather than taking a decision when the requirements for the exercise of its power were not fulfilled. By thus not choosing that more correct procedural route, the defendant institution, it claims, impinged on the jurisdiction conferred on the Court of

Justice by Article 220 EC and by Article 21(1) of the Merger Regulation; [19] and, secondly, it infringed Article 226 EC and committed an abuse of procedure.

39. As regards the first criticism, the Portuguese Government adds that, by giving a decision on the compatibility with Community law of the objectives of Decree-Law No 380/93, the contested decision in essence anticipated the judgment which the Court of Justice had already been called on to give under Article 226 EC on the legality of the Portuguese privatisation legislation (Case C-367/98). [20] As regards abuse of procedure, the Portuguese Government raises the question whether in fact the Commission may have adopted the contested decision for the sole purpose of making its own views prevail concerning the scope of the powers attaching to it under Article 21 of Regulation No 4064/89.

40. For its part the Commission, by way of preliminary, states (i) that, as expressly admitted by the applicant Government, the measures of 5 July and 11 August 2000 were not intended to protect any intrinsically legitimate interests; and (ii) that that Government did not notify to the Commission the other public interests which it intended to protect, not even after it had been called on by the Commission to submit its observations on that matter.

41. The Commission also maintains that, in cases where national measures protect interests other than intrinsically legitimate interests, the third subparagraph of Article 21(1) of the Merger Regulation empowers it to give a decision on the compatibility of those interests with Community law, regardless of whether or not they have been notified by the Member State concerned.

42. That provision, the Commission adds, would otherwise be deprived of any useful effect and would give an unfair advantage to Member States which failed in their obligations in the event that its competence were negated simply because of failure by the Member States concerned to submit a notification. Such a solution would also clearly run counter to the objective of Regulation No 4064/89 of establishing, at Community level, a 'one stop shop' system for monitoring concentrations.

19 — In that connection, the Portuguese Government states that, according to the abovementioned provision of the Merger Regulation, '[s]ubject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation' (emphasis added).

20 — In Case C-367/98, which was pending when the contested decision was adopted, the form of order sought was a declaration that, by adopting and maintaining in force Law No 11/90 of 5 April 1990, being the framework law on privatisations ... the decree-laws on the privatisation of undertakings subsequently adopted in application of that Law and also Decree-Laws Nos 380/93 of 15 November 1993 and 65/94 of February 1994 . . . the Portuguese Republic has failed to comply with its obligations under the EC Treaty, in particular Articles 52 (now, after amendment, Article 43 EC), 56 (now, after amendment, Article 46 EC), 58 (now Article 48 EC), 73b (now Article 56 EC) et seq and 221 (now, after amendment, Article 294 EC thereof, and Articles 221 and 231 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties. In that case the Court went on to give judgment on 4 June 2002 ([2002] ECR I-4731) upholding the Commission's application regarding the alleged infringement of Article 73b of the Treaty (now Article 56 EC).

43. As regards the accusation of having anticipated the judgment of the Court of Justice in Case C-367/98, the Commission points out that the contested decision challenges the compatibility with Community law not of the Portuguese legislation on privatisation, in particular Law No 11/90 and Decree-Law No 380/93, but of the interests underlying the measures by which the Portuguese Minister of Financial Affairs withheld authorisation for the acquisition of interests in Cimpor.

Assessment

44. So far as concerns the criticisms made in this case, it must be borne in mind first that, as the Court recently had occasion to emphasise, '[t]he Merger Regulation is based on the principle of a clear division of powers between the supervisory authorities of the Member States and those of the Community.' By virtue of that principle, 'concentrations not covered by [the Merger Regulation] come, in principle, within the jurisdiction of the Member States', whereas 'the Commission has sole jurisdiction to take all the decisions relating to concentrations with a Community dimension'. [21]

45. A clear expression of the principle of shared jurisdiction is to be found in Article 21(1) and (2) of Regulation No 4064/89, which provide that the Commission has exclusive jurisdiction to adopt the decisions provided for by that regulation (paragraph 1) and makes it clear that the Member States are not entitled to apply national competition legislation to concentrations with a Community dimension (paragraph 2).

46. Notwithstanding those provisions, as has been seen, Article 21(3) provides that the Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by the regulation and compatible with Community law (first subparagraph), specifically indicating what interests are intrinsically legitimate (second subparagraph), requiring the Member States to refer any other public interest to the Commission for consideration and requiring the latter to inform the Member State concerned of its decision within one month of that communication (third subparagraph).

47. It is, as I have stated, on the last paragraph that the criticism under review here is based. According to the Portuguese Government, it is clear from that provision that, in the absence of any notification of the interests protected by the measures of 5 July and 11 August 2000, the Commission was

21 — Case C-170/02 P *Schlüsselverlag* [2003] ECR I-9889, paragraph 32, where it is also made clear that the Commission also has exclusive competence, on the basis of Article 9 of the Merger Regulation, 'to decide to refer to the competent authorities of a Member State the file on certain transactions affecting more particularly a "market, within that Member State, which presents all the characteristics of a distinct market'.

not entitled to give a decision on the compatibility of those interests with Community law.

48. It seems to me, however, that that criticism is based more on a formalistic reading of the provision at issue than on its substance, purposes and context.

49. It must be borne in mind that the purpose of that provision is to ensure 'for reasons of legal certainty and in the interest of the undertakings concerned' [22] rapid and effective monitoring by the Commission of the compatibility with Community law of the interests (other than intrinsically legitimate interests [23]) that are protected by national measures relating to concentrations with a Community dimension.

50. That is why that provision, first, requires the Member States to give advance notice to the Commission of the interests (other than intrinsically legitimate interests) which they intend protecting and, second, gives the Commission a short time-limit (one month) to adopt a decision as to their compatibility with Community law. That is in line with the objective of Regulation No 4064/89 of ensuring 'scrutiny of concentrations within periods compatible both with the requirements of sound administration and those of commercial life'. [24]

51. However, the clear wish of the legislature to guarantee rapid and effective scrutiny by the Commission does not sit easily with the applicant Government's contention that, in the absence of any notification from the Member State concerned, that institution has no right to decide as to the compatibility with Community law of the interests protected by that Member State but is entitled only to commence infringement proceedings under Article 226 EC. In such circumstances, having regard to the procedural time-limits to be observed in such cases, it would be impossible for a Community decision to be given within the short time-limit laid down 'for reasons of legal certainty and in the interest of the undertakings concerned' by Regulation No 4064/89, with the inherent risk that the Court's judgment would be delivered after the national measures had irretrievably prejudiced the transaction involving a concentration of a Community dimension.

22 — The citation is from *Schlusselverlag*, cited above, where it is emphasised that '[t]he Merger Regulation ... contains provisions whose purpose is to restrict, for reasons of legal certainty and in the interest of the undertakings concerned, the length of the proceedings for investigating transactions which are the responsibility of the Commission', paragraph 33.

23 — Review by the Commission in relation to such interests is excluded because the Community legislature has already expressly made its views clear

24 — *Schlusselverlag*, paragraph 34.

52. Furthermore, as the Commission has properly emphasised, the Portuguese Government's thesis would in practice deprive the provision under review of any effectiveness because the Member States could easily escape the control for which it provides simply by failing to give notice of the interests protected by their measures. There would also be the further and paradoxical consequence that the Commission would be able to act rapidly and effectively against Member States that comply with their notification obligation, to the extent of blocking the adoption of the measures in question, whereas it would have no opportunity to exercise a similar incisive power against offending Member States. In other words, the latter would derive an advantage from their own unlawful conduct, in blatant conflict with the maxim *nemo auditur propriam turpitudinem allegans.* [25]

53. The interpretation advocated by the Commission, according to which it may give a decision on the compatibility with Community law of the interests (other than intrinsically legitimate interests) protected by Member States, even if those interests have not been notified to it, therefore seems to me to be more in keeping with the special system for the monitoring of concentrations set up by Regulation No 4064/89 and with the rationale of the provision under review.

54. Accordingly, it would seem more appropriate to conclude that the provision in question refers to decisions adopted following a 'notification' from the Member States simply because it is presumed that the Member States will fulfil the obligation imposed on them by that provision to make that notification. Much less plausible, on the other hand, would be the view that the Merger Regulation seeks to make the competence of the Commission dependent upon the good will of the Member States and still less that it seeks to reward those which evade the obligation of notifying.

55. It is true that, as the Portuguese Government has observed, lack of notification by the Member States may render the Commission's task more uncertain and complex in so far as it might encounter difficulties in identifying the interests protected by the national measures. I would observe, however, that in order to surmount possible difficulties of that kind the Commission can always avail itself of the opportunity of seeking information from the Member States concerned, as in fact it specifically did in the present case. Where the Member States persist in refusing to supply the requested information, the Commission should immediately consider itself entitled — by analogy with the position which arises,

25 — See in that connection the Opinion of Advocate General Mischo in Case C-453/99 *Courage* [2001] ECR I-6297, paragraphs 39 and 68.

for example, in relation to State aid [26] — to adopt a decision based solely on the information available.

56. It having thus been made clear that the Commission may give a decision on the compatibility with Community law of interests (other than intrinsically legitimate interests) protected by the Member States even where the interests have not been notified to it, it follows that the adoption of such a decision involves neither an encroachment upon the jurisdiction conferred on the Court by Article 226 EC nor any misuse of procedure.

57. In the light of the foregoing considerations I am of the opinion that the criticisms under review must be rejected.

Infringement of Article 253 EC: lack of, or insufficient, indication of the legal basis of the measure

58. By its first plea, the Portuguese Government alleges defective reasoning of the contested decision owing to a failure to indicate adequately, or at all, its legal basis. More particularly, it observes that, in the title and in the preamble to the decision, the Commission confined itself to referring in general terms to Article 21 of the Merger Regulation, without, however, making it clear, as it should have done, that it was basing its competence on the third subparagraph of that Article 21(3).

59. I agree, however, with the Commission that it is clear from the text of the decision that it was adopted under the third subparagraph of Article 21(3) of the Merger Regulation. It therefore seems to me that, from that standpoint, the statement of the reasons on which the decision is based achieves, as required by the case-law, 'the purpose of ... [enabling] the Court to review the legality of the decision and [providing] the person concerned with sufficient information to make it possible to ascertain whether the decision is well founded or whether it is vitiated by a defect which may permit its legality to be contested'. [27]

60. I would add that in the present case the reasoning of the contested decision without doubt allowed the Portuguese Government to identify the provision on which the Commission based its power and, as we have seen, to challenge the exercise of that power before the Court.

26 — Reference may be made by analogy to the case-law of the Court of Justice on State aid, according to which, where a 'Member State, notwithstanding the Commission's order, fails to provide the information requested, the Commission is empowered to terminate the procedure and make its decision, on the basis of the information available to it, on the question whether or not the aid is compatible with the common market' (Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 22).

27 — Case C-182/99 *Salzgitter* [2003] ECR I-10761, paragraph 71.

61. I therefore consider that the present plea in law should also be rejected.

Infringement of Article 253 EC: insufficient statement of reasons concerning the incompatibility of the national measures with Community law

62. By its second plea, the Portuguese Government alleges defective reasoning of the contested decision in that it does not give a sufficient explanation concerning the incompatibility of the national measures with Community law.

63. More particularly, the Portuguese Government states that in the contested decision the Commission confined itself to identifying the interest protected by the measures of 5 July and 11 August 2000, deciding that that interest did not fall within the scope of any of the intrinsically legitimate interests and asserting laconically that the two measures constituted unjustified obstacles to freedom of establishment and to the free movement of capital. That statement of reasons, in its opinion, is entirely inadequate because it does not contain any specific and substantive assessment, based on points of fact and law, of the interest protected by the national measures in the light of the relevant Community framework.

64. To illustrate the inadequacy of the reasoning, the Portuguese Government analyses at length its national privatisation rules and, in particular, the system of prior authorisation provided for by Article 1 of Decree-Law No 380/93, explaining why that system is not in its view incompatible with the provisions of Community law concerning the right of establishment and the free movement of capital.

65. In response to those submissions, the Commission observes succinctly that the decision analyses the interests underlying the contested national measures and gives the reasons for which they do not fall within the scope of intrinsically legitimate interests and cannot be regarded as compatible with Community law.

66. For my part, I must observe that, after identifying the interest protected by the national measures and ruling out the possibility that it might fall within the scope of any of the intrinsically legitimate interests, the Commission provided an extremely concise statement of reasons concerning the incompatibility of that interest with Community law. In view of the delicacy of the issue, a more comprehensive and specific

statement of reasons on that point would in my opinion have been appropriate.

67. Although extremely concise, that statement of reasons nevertheless enables the passages on which the Commission's legal reasoning is based to be understood. From paragraph 58 of the contested decision it is clear that the Commission considered that '[t]he two decisions [of the Portuguese Minister of Financial Affairs] constitute barriers to the freedom of establishment and free movement of capital'; that they were 'not warranted under any essential grounds of public interest recognised in the case-law of the Court of Justice', that 'in any event, the Portuguese Government has not advanced any such grounds'; and that 'the general principle of equal treatment, which is relied on by the Portuguese Government in the first decision, adds nothing of substance to the grounds set out above'. [28]

68. I am therefore of the opinion that the reasons given attain the minimum level laid down by the case-law (see point 59 above), particularly if it is borne in mind: first, that the Portuguese authorities gave the Commission no information regarding the compatibility with Community law of the interest protected by their measures, not even in reply to the letter of 21 September 2000; second, that the contested decision was adopted in circumstances well known to the Portuguese Government, since, in the course of the infringement procedure in the abovementioned Case C-367/98, the Commission had already informed that government, in a copious statement of reasons, that the system of prior authorisation provided for by Article 1 of Decree-Law No 380/93 was incompatible with the Community rules on the right of establishment and the free movement of capital. [29]

69. I consider therefore that the present plea must also be rejected.

Breach of the principle of proportionality

70. By its fifth plea in law, the Portuguese Government, finally, puts forward two criticisms alleging breach of the principle of

28 — Paragraph 58 of the contested decision.

29 — With regard to the latter aspect, I would point out that the Court has already had occasion to make it clear that 'the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context' (Case C-301/96 *Germany* v *Commission* [2003] ECR I-9919, paragraph 87). In that case, the Court held in particular that because 'the contested decision was adopted in a context with which the German Government was familiar ... [it] could be reasoned in a summary manner' (paragraphs 89 and 92).

proportionality, accusing the Commission: (i) of not confining its review to the concentration having a Community dimension; and (ii) not suspending the procedure even though the parties had no further interest in it.

71. As far as the first point is concerned, the Portuguese Government states that it is clear from the contested decision that the operation notified would have given rise to two concentrations (Secil/Cimpor and Holderbank/Cimpor) and that only the second would have had a Community dimension and therefore fallen within the scope of Regulation No 4064/89 (see point 21 above). For that reason, by ordering withdrawal of both the Portuguese measures in their entirety, rather than only the part concerning the Holderbank/Cimpor concentration, the Commission went further than was necessary to ensure compliance with Community law and, accordingly, contravened the principle of proportionality.

72. I concur however with the Commission's view that it was not entitled to limit its intervention to the acquisition of certain business activities of Cimpor by Holderbank (the concentration having a Community dimension), since the contested national measures concerned both concentrations jointly and inseparably. As we have seen, those measures did not affect the two concentrations separately but blocked the takeover bid launched by Secilpar for Cimpor shares, thereby preventing from the outset the acquisition of the company and the subsequent splitting of its business between Secil and Holderbank. Only an order to withdraw the measures in their entirety was therefore capable of removing the Portuguese Government's illegal opposition to the concentration having a Community dimension.

73. As regards the second point, the Portuguese Government observes, on the other hand, that shortly before the adoption of the contested decision the Commission had suspended the procedure concerning the notified operation because the undertakings concerned had not provided information required of them to supplement the notification that was considered incomplete (see point 14 above). On the premiss that inertia on the part of the notifying parties might indicate that the procedure had lapsed, the Portuguese Government contends that the Commission should have displayed greater prudence and should not have ordered definitive and irreversible action such as withdrawal of the contested national measures.

74. On this point too, I am more convinced by the Commission's defence, where it reiterates that the Portuguese Government has not explained why, in the particular circumstances of this case, the parties' inertia should prompt the conclusion that the procedure had lapsed. It seems to me, on the contrary, that the Commission was entitled to conclude that in all probability

the parties' inertia was in some way linked with the adoption of the contested measures and therefore to consider that its intervention was particularly important and urgent.

75. I therefore consider that this plea should also be rejected.

Costs

76. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The Commission has applied for costs and therefore, in view of my conclusions concerning the outcome of the proceedings, I consider that that application should be granted.

IV — Conclusion

77. In view of the foregoing considerations, I propose that the Court:

(1) Reject the application;

(2) Order the Portuguese Republic to pay the costs.